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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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CENTRAL CALIFORNIA CANNERIES COMPANY,  
Appellant.

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GRIFFIN & SKELLEY COMPANY,  
Appellant.

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J. C. AINSLEY PACKING COMPANY,  
Appellant.

\_\_\_\_\_  
ANDERSON-BARNGROVER MANUFACTURING  
COMPANY,  
Appellant.

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GOLDEN GATE PACKING COMPANY,  
Appellant.

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J. F. PYLE & SONS, INC.,  
Appellant.

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HUNT BROTHERS COMPANY,  
Appellant.

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SUNLIT FRUIT COMPANY,  
Appellant,

vs.

\_\_\_\_\_  
DUNKLEY COMPANY,  
Appellee.

No. 2915.

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**PETITION FOR REHEARING**

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WILLIAM K. WHITE,  
FREDERICK S. LYON,  
KEMPER B. CAMPBELL,  
Solicitors and Counsel for Defendants-Appellants.



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SUNLIT FRUIT COMPANY,	Appellant,	
_____		
vs.		
DUNKLEY COMPANY,	Appellee.	
_____		

**Petition for Rehearing.**

The defendants-appellants feeling themselves aggrieved by the decision herein rendered by this Honorable Court on October 1, 1917, come now and respect-

fully petition the Court for a rehearing of this cause, upon the grounds hereinafter set forth.

#### REJECTION OF CAMPBELL'S TESTIMONY.

Regarding Campbell's testimony, the Court says:

"In other words, his testimony is to the effect that he was the designer of the invention for which Dunkley received a patent. But defendants insist that the testimony of this witness was not introduced to prove that fact, and they refer to their answer as showing that it was not so pleaded as a defense. The purpose of this testimony, they say, was to discredit the claim of Dunkley that he was the inventor, and not to offer the defense that Campbell was the inventor. But the testimony of Campbell upon that question was material and relevant to the issue before the court, and was either true or not true. If true, Dunkley was not the inventor of the device claimed as his invention, and that would end the case. If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that reason be wholly rejected. *Falsus in uno, falsus in omnibus*. But the defendants say they offer it only to prove that Dunkley was not the inventor. They stand on the priorities set up in their answer as defenses, namely, the priority of the Vernon patent for a process for peeling fruit and the Grier device for an apparatus used in conducting that process. They deny the priority of the Dunkley peach-peeling machine and offer the testimony of Campbell to prove that fact. This they cannot do. They cannot offer this testimony as true to prove a material and relevant fact for one purpose, and discredit it for another purpose. If it is true for one purpose it is true

for any purpose. And as the defendants have refused to commend the testimony of this witness to the court as true for a purpose to which it was relevant and material, we must reject it for the purpose for which it was offered, namely, to fix the date of the Dunkley constructed machine in 1903 instead of 1902."

In justice to Campbell and in justice to ourselves, we respectfully and most earnestly protest against the inclusion, in the decision, of said statements to the effect that we have discredited Campbell's testimony for any purpose or have refused to commend it to the Court for all purposes. We respectfully submit that no part of our argument is susceptible of the construction so placed on it.

The foregoing remarks of the Court are obviously based on that part of our argument commencing on page 151 of our Opening Brief and reading as follows:

"Campbell stated that he designed certain of the said machines so built by him and his contention, in that regard, was said by the lower Court to be incredible. Of course, it is absolutely immaterial in this case, whether or not Campbell was the inventor of any of said machines, even the peach-peeling machine. Whether he or Dunkley conceived said machine in August, 1903, is of no moment. Prior to that time, Grier had two anticipating machines in commercial operation in California. Therefore, defendant made no effort in this case to establish the fact that Campbell was the one who actually did design the Dunkley peach-peeler, although admittedly Dunkley told

him generally to build such a machine to do the work which Bruncker had done by hand, to wit: remove the disintegrated skin from the peach by subjecting it to the action of brushes and water. That Campbell certainly worked out the details of construction of the peach-peeling machine, is shown by the testimony of the two Dunkleys, both of whom were unable to give such details. S. J. Dunkley's ignorance regarding such details is indicated by the following answers given by him.

"'MR. WHITE—I direct your attention to this "Plaintiff's Exhibit No. 10" and ask you what function in the operation of the machine, did these gears perform which are on the shaft on which the pulley at the other end of the machine, is mounted?

"'A. I presume, if there is gears there, to help turn the brushes.

"'Q. Do you know?

"'A. No, I do not know, it is a simple enough machine; anybody could judge by looking at it' (R. 496).

"The following is an example of Melville Dunkley's recollection of such details of the model machine:

"'Q. As a matter of fact, it was driven by a friction gear, isn't that correct?

"'A. I don't know; I could not say; I have an idea it was driven by gears; but as to the manufacture, I could not remember' (R. 436).

"It is sometimes a close question as to who is the real inventor of a very simple machine; the man who suggests the general idea of making such a machine to perform a certain function, or the man who, from such a suggestion, combines together the necessary, but very simple, mechanical elements and movements to perform such function. Either might well contend and honestly contend,

he was the inventor. Therefore, no emphasis was placed on Campbell's contention that he designed the Dunkley peach peeler. *We believe his testimony, in that regard, is absolutely true*, but, as a defense, said contention was not relied on herein and was not pleaded. However, it very naturally was disclosed by Campbell when he was giving the history of the Dunkley peach peeler. Even though the lower Court was unable to give credence to such contention, there was no reason for it to reject the whole testimony of Campbell by reason thereof. As Campbell actually built the first two peach-peeling machines and must have supplied many of the details of construction thereof, the lower Court could at least have taken the view, that it was not an unnatural thing for him to really believe he invented the same, although as a matter of law, it might be considered that Dunkley's general suggestion was sufficient to constitute him the inventor.

"That Campbell had the ability to invent the peach-peeling machine is admitted by the Dunkleys. As stated by Melville Dunkley, Campbell was known '*as more or less of a genius,*' and was *actually employed to invent and develop new machines* (R. 456). Furthermore, it was admitted that Campbell invented machines far more complicated than the extremely simple peach-peeling machine, and it was not denied, that practically all his time was devoted to the designing and building of new machines."

From our point of view, our statement that "*We believe his testimony in that regard is absolutely true* . . ." is the highest commendation we, personally, can give to the testimony of any witness.

Under all the decisions of which we have any

knowledge, the mere testimony of a single witness to the effect that he, and not the patentee, was the inventor of the device covered by the patent issued to such patentee, is insufficient to prove the invalidity of the patent.

What was said by Dunkley, at the time he admittedly instructed Campbell to build a machine to do the work Brunner had been experimentally doing by hand, is, of course, known only to Dunkley and Campbell. Whether or not, Dunkley's instructions could be deemed sufficiently comprehensive to constitute a disclosure of the inventive idea of means, is known only to Dunkley and Campbell. Therefore, it would have been an idle and futile thing for defendants to have pleaded or urged the defense that Campbell was the real inventor.

Our words: "*We believe his testimony, in that regard, is absolutely true . . .*," are certainly words of commendation. There can be no question as to that fact.

The Court's rejection of his testimony, therefore, can have no basis other than the fact that defendants refrained from doing an idle and futile thing.

We respectfully submit that the application of the maxim "*Falsus in uno, falsus in omnibus*" to such a situation is without precedent and finds no support in logic or in human experience.

At all times during this litigation, we have been willing and we are now willing to commend Camp-

bell's testimony to this Court as true. It is, therefore, most surprising to us to find the Court construing our attitude and our references to Campbell's testimony in the manner set forth in the decision.

We respectfully urge the Court to consider the justice of condemning a witness as unworthy of belief simply because the attorneys, calling him to the stand, have failed or refrained from pleading or urging some defense in support of which a portion of his testimony is material but, even though believed to be true, is insufficient in law to sustain.

We respectfully urge the Court to consider the justice of proclaiming to the world a witness is unworthy of belief because of an inference drawn, *not from anything done or said by the witness*, but from the words and conduct of others over whom the witness has no control.

Surely, such a vicarious punishment cannot appeal favorably to this Court's sense of justice and we, therefore, hopefully believe the wrong will be rectified.

DECISION HEREIN CONFLICTS WITH DECISION OF COURT  
OF APPEALS FOR DISTRICT OF COLUMBIA.

We respectfully submit that the decision of this Honorable Court is in conflict with the decision of the Court of Appeals for the District of Columbia in the Dunkley-Beekhuis Interference in respect to questions of law and of fact.

## I.

## CONFLICT IN RESPECT TO QUESTIONS OF FACT.

Under the authority of *Westinghouse Electric & Mfg. Co., v. Stanley Instrument Co.*, 133 Fed., 167, cited and quoted from on page 16 of our reply brief, we filed with the Clerk of this Court, a copy of the record on behalf of Dunkley in said interference.

In the Dunkley-Beekhuis interference decision, the Court of Appeals says:

“All the tribunals of the office found that Dunkley was the first to conceive and reduce to practice, provided he was entitled to make the claims of the issue and this decision was undoubtedly right.”

The foregoing general findings of fact were based upon the *undisputed* and uncontradicted proofs offered on behalf of Dunkley. Those proofs included a *complete* history of the Dunkley invention.

According to said *complete* history of the Dunkley invention, the *first* machine, embodying said invention, was not built until 1903 during the period when defendants' witness, William Brunker, was admittedly at South Haven.

The said findings of fact of the Court of Appeals for the District of Columbia are, therefore, to the effect that Dunkley's *first* machine was built in 1903 at a time when William Brunker was admittedly at South Haven.

This Court, in accepting as true the Dunkley testi-

mony herein, necessarily finds that Dunkley's *first* machine was built in August, 1902, *almost a year before Bruncker was ever employed by the Dunkley Company.*

This Court, we respectfully submit, in so finding that Dunkley's *first* machine was built in August, 1902, necessarily rejects, as untrue, the Dunkley 1910 testimony in the Dunkley-Beekhuis Interference to the effect that *the same identical machine* was built in 1903, at a time when William Bruncker was at South Haven.

When the two Dunkleys were on the stand herein, they admitted giving their 1910 interference testimony to the effect that the *first* Dunkley machine was built in 1903.

In addition to considering their said interference testimony so repeated to the Dunkleys, when on the stand herein, we respectfully submit this Court is entitled, according to the decision in said case of *Westinghouse Electric Mfg. Co. v. Stanley Instrument Co., supra*, to consider the Dunkley Interference record on file with the Clerk.

#### HISTORY OF DUNKLEY PEACH-PEELING MACHINES.

Portions of the Court's decision indicate that we have heretofore failed in our efforts to clearly set forth the facts and explain our contentions in respect thereto. We, therefore, deem it necessary to again refer to matters mentioned in our previous briefs.

*It is admitted that, prior to November 1, 1904, only two peach-peeling machines were built by Dunkley.*

It is admitted that the *first* machine built was the so-called model machine, the wooden frame of which was offered in evidence as "Plaintiff's Exhibit No. 10" (R. 480).

It is admitted that said model was a *single line* machine; that is, it embodied but *one* brush carrier or belt for conveying the peaches between the two brush rolls and the perforated pipes associated therewith.

It is admitted that the *second* machine built, was the so-called commercial machine, a photograph of which is in evidence as "Defendants' Exhibit S."

It is admitted, as shown in such photograph reproduced opposite page 141 of our Opening Brief, that the *second* machine was a *three line* machine; that is, it embodied *three* separate brush carriers or belts, each of which conveyed peaches between two brush rolls and the perforated pipes associated therewith.

It is admitted that a lye-tank was built for and used with such *commercial* machine.

*The Dunkleys admit that no other peach-peeling machines, embodying the Dunkley invention, were built before November 1, 1904* (R. 448 and 501).

In the Dunkley-Beekhuis Interference, the Dunkleys were asked for the *complete* history of the Dunkley invention.

*In giving such complete history of the invention, neither the Dunkleys nor any witness called on their behalf, even remotely suggested or intimated that any peach-peeling machine or device or part of any such machine or device or any model or part of a model, embodying the Dunkley invention, was made, bought or used prior to the period of William Brunker's employment, in 1903, by the Dunkley Company.*

On the contrary:

Dunkley, the patentee, in 1910, swore that the *first* machine, completely and accurately identified by him as the small model and being a *single* line machine, was built in 1903 at a time when William Brunker was admittedly at South Haven. Dunkley also identified a photograph of the *wooden frame* of said model machine, a duplicate of which photograph is in evidence as "Defendant's Exhibit R" (R. 485-489).

Melville Dunkley, the patentee's son, also, in 1910, swore that the same identical *single* line model machine, admittedly the *first* machine built, was made in 1903, at a time when William Brunker was admittedly at South Haven in the Dunkley Company's employ (R. 441).

Melville Dunkley, in 1910, also swore that, at the time said identical *single* line model machine was built at South Haven, William Brunker, Stewart Campbell and Fred Brown were working there and any of them might have worked on it.

Abraham Verhage, in 1910, also swore that the said

*single* line model machine was made in 1903 at a time when William Bruncker was at South Haven.

VERHAGE TESTIMONY CLENCHES DEFENDANTS'  
CONTENTIONS.

The wooden frame of Dunkley's *first* machine, to wit: the *single* line model machine, is in evidence in this case as "Plaintiff's Exhibit No. 10." A photograph of said wooden frame is in evidence as "Defendants' Exhibit R." Said photograph, Exhibit R, is a duplicate of the photograph marked "Dunkley's Exhibit No. 1, Photograph of *Frame of First Dunkley Machine*" offered in evidence on behalf of Dunkley in the Dunkley-Beekhuis Interference.

In the said interference, Verhage testified as follows:

"Q. 10. Will you indicate *about the time*, so near as you can remember, that the *first wooden frame was made*?

"A. *July, 1903.*

"Q. 11. What did you know about the machine in July, 1903, or did you see it or have anything to do with it?

"A. I did not have anything to do with it. I saw it but did not have anything to do with it.

"Q. 12. Where did you see it?

"A. South Haven.

"Q. 13. Any particular place there, do you remember that you saw it?

"A. I do not recollect any.

"Q. 14. At what plant was it that you saw it, that you remember?

"A. At the plant of the Dunkley Company.

"Q. 15. At what place in the plant was the machine set up?

"A. *It was first set up in the basement in the north wing.*

"Q. 16. *Who set it up there, if you know?*

"A. *Mr. Campbell and myself.*

"Q. 17. Did you see the machine work after it was set up.

"A. Yes sir.

"Q. 18. Did it peel peaches successfully?

"A. Yes sir.

"Q. 19. Please state the way in which the machine did the work, indicating *the parts of the machine*, and how *they* worked, as well as you are able and as well as you remember.

"A. Well, we had *a belt* with brushes and *two* rotary brushes, which was used as a carrier to carry the peach through and keep the peach revolving. Then, there was *three* perforated pipes that did the peeling, after *they went through the lye process.*

"Q. 23. I show you a photograph, 'Dunkley's Exhibit No. 1, Photograph of *Frame of First Dunkley Machine*,' and ask if you are able to identify it?

"A. Yes, sir.

"Q. 24. State what it is from what you know about the subject.

"A. *It is the first frame that was built, the first machine operated."*

It is to be noted that, in 1910, Verhage testified that the *wooden-frame* of Dunkley's *first* machine was made in 1903 at a time when William Brunker admittedly was at South Haven. *Verhage's testimony cannot be disposed of on the ground that he was talk-*

*ing about some machine other than Dunkley's first machine.* He identified a photograph of such wooden-frame and *the same identical wooden frame*, shown in such photograph, has been offered in evidence in this case by the Dunkley Company and identified by the Dunkleys as being *the wooden-frame of the first machine ever built by Dunkley* and embodying the invention covered by the patent in suit.

In his 1910 testimony in said interference proceeding, Melville Dunkley also identified the said photograph of such wooden-frame and also testified that the frame was a part of the original machine built in 1903. His testimony is as follows:

“MR. WHITE—Q. Mr. Dunkley in Interference No. 30,610, between Samuel J. Dunkley and H. A. Beekhuis, did you testify as follows regarding a photograph, a duplicate of which has been introduced in evidence as ‘Defendants’ Exhibit R’ to wit:

“‘Q. 28. I show you a photograph and ask you if you are able to recognize the same and tell me what it is?

“‘A. Yes, sir. It is a photograph of the *frame* and some parts of the *original machine built during the summer of 1903*, about which I have just testified.’

“THE WITNESS—Yes” (R. 441).

We respectfully submit that, in accepting the Dunkley testimony herein as true, the Court must necessarily reject, as false, the 1910 testimony of the two Dunkleys and Verhage.

As said 1910 testimony was adjudged true by the decision of the Court of Appeals for the District of Columbia, it follows there is a conflict between that decision and the decision herein in regard to a question of fact.

#### BRUNKER'S TESTIMONY.

Brunker's testimony is apparently disposed of in the following statement of the Court:

"But accepting Campbell's testimony as true in those particulars wherein he is corroborated by other witnesses, we find he worked for Dunkley on a machine of some kind in 1903, but this does not identify the machine as the one Dunkley claims to have invented in 1902, nor does it tend to prove the machine as Campbell's invention."

As before stated, *it is admitted that, prior to November 1, 1904, only two peach peeling machines, embodying Dunkley's invention, were built by him.*

The first machine, built by Dunkley, was a *single* conveyor machine.

There was only *one* single conveyor machine built at any time by Dunkley.

The *second* machine built by Dunkley was a *three* line machine—that is, it embodied *three* carrier conveyor belts.

These were the only Dunkley machines in existence prior to November 1, 1904.

These two machines are clearly described, distinguished and identified by Campbell.

Defendants' witness, Bruner, was employed at South Haven by the Dunkley Company during the period commencing the latter part of June, 1903, and ending the latter part of October, 1903. He was never there at any other time.

We respectfully submit that Bruner's identification of the peach peeling machine, built while he was at South Haven, is full and complete.

He clearly identified said machine as one embodying only a *single* conveyor belt, and, admittedly, the *single* conveyor machine was the *first* machine ever built by Dunkley. Regarding said machine Bruner, on cross-examination, testified:

"XQ. How many of the *conveyor belts* were there in the machine when it was completed?

"A. Conveyor-belts?

"XQ. Yes?

"A. There was only *one* conveyor belt; we had no line conveyor, just the machine" (R. 622).

We respectfully submit that Bruner's recital of the circumstances leading up to and surrounding the building of said *single line* machine, necessarily shows it was the *first* Dunkley machine ever built by Dunkley.

*In view of the 1910 testimony of the two Dunkleys and of Verhage to the effect that Dunkley's first machine, to wit: the single-line model machine, was built in 1903, while Bruner was at South Haven, why should Bruner's 1916 testimony to the same*

*effect be rejected as untrue or improbable or indefinite or uncertain?*

## II.

### CONFLICT IN RESPECT TO QUESTION OF LAW.

We respectfully submit that the decision herein conflicts with the decision of the Court of Appeals for the District of Columbia in respect to a question of law to wit: *the proper interpretation of the Dunkley "peeling-jet" claims.*

Those claims were allowed to remain in the Dunkley application because the Court found that, in the Dunkley machine, the water spray "*entered into the operation of removing the skins*" and *not* because the water-spray or jets were the exclusive means for removing the skins. On the contrary, the Court found that, in the Dunkley machine, the water spray or jets were *not* the exclusive peeling means.

In construing the counts of the interference, which are now the Dunkley patent claims in issue in this cause, the Court said:

"But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and *relied chiefly upon the action of the brushes to remove the skin:* . . . The counts of the issue are satisfied by a construction in which peeling water jets *enter into the operation of removing the skins* whether they be exclusively employed to remove the skins or not."

By placing the foregoing meaning and construction upon the counts, the Court was able to find that the Dunkley machine "satisfied" the counts and embodied the subject-matter thereof.

It logically follows that any *prior* machine "satisfies" and embodies the subject-matter of the counts, now the Dunkley patent claims, if such prior machine embodies "water-spray" or "water jets" which play upon the peaches and "*enter into the operation of removing the skins*" thereon.

According to the testimony and admissions, given and made on behalf of plaintiff, the Vernon machine necessarily embodied water-spray or jets that "*entered into the operation of removing the skins.*"

*The question of anticipation by the Vernon machine is a question of law.*

*All the facts, necessary to a determination of such question of anticipation, are established by plaintiff's testimony and admissions.*

In passing on such question of anticipation, it is unnecessary for the Court to consider any testimony or proofs on behalf of defendant or consider any disputed fact.

Aside from the *time factor*, questions of anticipation and of infringement are the same. It is established that the question of infringement is sometimes merely a question of law. In *Singer Company v. Cramer*, 192 U. S., 275, the Supreme Court said:

"As in each of the patents in question it is ap-

parent from the face of the instrument that extrinsic evidence is not needed to explain terms of art therein, or to apply the descriptions to the subject-matter, and as we are able from mere comparison to comprehend what are the inventions described in each patent and from such comparison to determine whether or not the Diehl device is an infringement upon that of Cramer, the question of infringement or no infringement is one of law and susceptible of determination on this writ of error. *Heald v. Rice*, 104 U. S., 737; *Market Street Cable Ry. Co. v. Rowley*, 155 U. S., 621, 625."

#### PLAINTIFF'S PROOFS AND ADMISSIONS REGARDING VERNON MACHINE.

In our discussion of the Vernon machine, commencing at page 53 of our reply brief, we referred to certain quotations from the testimony of plaintiff's witnesses and from the statements of plaintiff's attorneys which, in our opinion, proved the presence, in the Vernon machine, as *commercially* used for two years, of all the elements of the Dunkley machine, including the "*peeling jets*" as defined by the Court of Appeals for the District of Columbia.

Briefly, the facts, admitted and established by *plaintiff's* proofs, are

The presence, in the Vernon machine, of every mechanical element of the Dunkley machine *including the perforated spray-pipe over the carrier belt.*

The *natural* water pressure at Fresno was from 35 to 37 pounds (R. 686).

The water issued from such perforated pipe in the form of *spray*. [Note: This impossible, unless water under pressure.]

The peeling effect of the spray or jets varies according to the strength of the lye-solution.

Brushes, *alone*, are incapable of removing the disintegrated skins to an extent sufficient to turn out a *merchantable* product.

The peeling effect of the water spray or jets is *absolutely essential* to the turning out of a *merchantable* product.

The Vernon machine was *commercially* used two years.

That, in 1903, two or three more of said machines were installed and used by the California Fruit Canners Association.

We respectfully submit that, from the foregoing premises, only one conclusion can be drawn, to wit: that the water spray or jets, in the Vernon machine, "*entered into the operation of removing the skins*" and, therefore, must be held to be "peeling jets" within the meaning of that term as defined by the Court of Appeals for the District of Columbia.

#### DUNKLEY PEACH PEELING TABLE.

In the Court's decision, it is said:

"According to the testimony of this witness, he designed and built, in August, 1903, a peach-peeling *table* for which the plaintiff obtained the pat-

ent in suit, and this he did without any ideas from Dunkley as to its construction."

We respectfully submit that the foregoing statement indicates a serious misunderstanding of defendants' contentions and of Campbell's testimony.

The peach-peeling *table*, referred to by Campbell and Brunker, did *not* embody the invention covered by the patent in suit. A photograph of such table appears opposite page 99 of our opening brief. Such table was built by Campbell in July and August of 1903 for the purpose of being used by the women engaged in peeling peaches *by hand*.

It was eighty or ninety feet long and fifty or more women are shown, in such photograph thereof, peeling peaches *by hand*.

The building of this immense *hand* peeling table in July and August of 1903 and the fact that the Dunkley Company incurred the large expense of so building it at that time, were *circumstances* urged by us as showing that, at that very time, Dunkley did not have the peach-peeling *machine* covered by the patent in suit.

Such machine was designed for the purpose of doing away with *hand* peeling. Therefore, if Dunkley had such a machine in July, 1903, he would not have gone to the useless expense of building such immense *hand* peeling table.

In 1904, when he did have his first commercial peach peeling *machine*, most of the said *hand* peeling

*table* was removed and only twenty or twenty-five feet left as an *inspection* table on which the peaches were inspected after leaving the said commercial peach peeling machine. A photograph of such commercial peach-peeling machine is reproduced opposite page 141 of our opening brief. As said before, it was a *three* line or brush belt machine.

Campbell admittedly left the Dunkley Company's employ about September 1, 1904. The Court's decision erroneously fixes the date as December, 1904. The date of his leaving is most important because he testified that about the *last thing* he did was to complete and test the first Dunkley *commercial* machine. In other words, Dunkley's first peach peeler was the small *model* and the second was the three line *commercial* machine. Campbell left before such *commercial* machine was ever put into regular commercial use.

As Campbell admittedly left the Dunkley Company about September 1, 1904, and as he fixes the date of completion of Dunkley's first *commercial* machine by his date of leaving, there is no opportunity for him to be mistaken as to such date.

## CONCLUSION.

In conclusion, we desire to call attention to certain unique phases of this litigation.

The testimony and proofs, regarding the Grier invention and the Grier machines, were given full credence by the lower Court and, apparently, by this Court.

Such full credence was given to the Grier proofs notwithstanding the same find absolutely no corroboration in the plaintiff's testimony or proofs.

*On the other hand*, apparently no credence has been given the defendants' proofs regarding the Vernon machine, notwithstanding *all* the facts, relied on as proving the Vernon machine an anticipation, are established by *plaintiff's own proofs and admissions*, as summarized in our reply brief.

*Also, on the other hand*, apparently no credence has been given the testimony of Campbell, Brunker and Mapes, notwithstanding said testimony is, *in respect to its most vital features*, fully corroborated by the 1910 testimony of the two Dunkleys, quoted to them while on the stand herein, and by the 1910 testimony of the witnesses called on behalf of Dunkley in the Interference Proceeding.

We respectfully submit the foregoing presents a most unique situation, the existence of which is not suggested in the Court's opinion. In view of the foregoing and in view of the Court's failure to refer

to the conflict between the 1910 and the 1916 testimony of the Dunkleys, we are led to believe we have heretofore failed to make clear our various contentions and the facts upon which they are based.

Counsel for defendants-appellants are profoundly convinced that the Court has misapprehended the facts in the case and that a rehearing would work to ends of justice,

WILLIAM K. WHITE,  
FREDERICK S. LYON,  
KEMPER B. CAMPBELL,  
Counsel for Defendants-Appellants.

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded; that the case is one in which the prayer of the petitioners should be granted by this Court, and that the petition is filed in good faith and not for the purpose of delay.

WILLIAM K. WHITE,  
Of Counsel for Defendants-Appellants.